Supreme Court, U.S.
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No. A-

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1998

William C. Vosburgh; Margaret E. Vosburgh; Sandra J. Vosburgh,
Petitioners

v.

Timothy M. Welch; Thomas J. Moore; Ivette S. McCoy; Natalie J. Bachelder; Charles W. Stuckey; Kent S. Robinson; Leslie J. Westphal,
Respondents,

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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6-28-99

38pp

QUESTIONS PRESENTED FOR REVIEW

If criminal conduct is "within the scope of official duties" for absolute and qualified immunity, is government itself a criminal enterprise?

1. Did the Ninth Circuit go too far in expanding absolute and qualified immunity for criminal conduct; which, is not intimately associated with the judicial process, committed four years before initiating a criminal prosecution, in a conspiracy motivated by potential personal economic benefits from administrative forfeiture?

2. If *in rem* forfeiture proceedings are not "prosecutions" for 5th Amendment Double Jeopardy purposes (per *Ursery*), is initiating seizure and administrative forfeiture a "prosecution" for prosecutorial immunity purposes, under the 5th Amendment's Due Process clause and Equal Protection component?

3. Does the Ninth Circuit misapprehend *Imbler v. Pachtman*, and encourage malicious prosecution, by expanding immunity retroactively for Executive officers' criminal conduct committed prior to initiating a criminal prosecution?

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CITATIONS OF THE OPINIONS ENTERED

The memorandum opinion of the Court of Appeals (Thompson and Trott, JJ., with Rhoades, D.J.), is not published. It is noted at 166 F.3d 344 (table). A copy is attached as Appendix A. The district court's unpublished and uncited Opinion and Order is attached as Appendix B.

BASIS FOR JURISDICTION IN SUPREME COURT

A. The judgment of the United States Court of Appeals for the Ninth Circuit, affirming the district court's dismissal and summary judgment of applicants' causes of action against six federal defendants, was filed and entered on December 24, 1998. The state tort causes of action against state Defendant Moore were remanded with direction to dismiss without prejudice for lack of subject matter jurisdiction. Appendix A, at 2 and 6.

B. A timely petition for rehearing was denied by Order dated March 4, 1999, Appendix C. As a result, a petition for Certiorari was due, pursuant to this Court's Rules 13.1, 13.3 and 30.1, on or before June 2, 1999. The Vosburghs filed an application for extension of time on May 19, 1999. Pursuant to the Court Clerk's letter dated May 21, 1999, this Petition is due on or before July 2, 1999 and is filed timely.

C. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Constitution:

First Amendment: **Congress shall make no law** respecting an establishment of religion, or prohibiting the free exercise thereof; or **abridging** the freedom of speech, or of the press; or **the right of the people** peaceably to assemble, and **to petition the Government for a redress of grievances**.

Fifth Amendment: **No person shall** be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor **be deprived of life, liberty, or property, without due process of law (and equal protection component)**; nor shall private property be taken for public use, without just compensation.

Seventh Amendment: **In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.**

Ninth Amendment: **The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people**.

Statutes:

28 U.S.C.§ 2465. Return of property to claimant; certificate of reasonable cause; liability for wrongful seizure.

Upon the entry of judgment for the claimant in any proceeding to condemn or **forfeit property seized** under any Act of Congress, such property shall be returned forthwith to the claimant or his agent; but **if it appears that there was reasonable cause for the seizure, the court shall cause a proper certificate thereof to be entered and** the claimant shall not, in such case, be entitled to costs, **nor** shall **the person who made the seizure, nor the prosecutor, be liable** to suit or judgment on account of such suit or prosecution.

STATEMENT OF THE CASE

In July 1992, Defendants commenced a six-year-long endeavor involving perjury (18 U.S.C. §§ 1621-23), fraud (18/1001, 1341), extortion [18/872, 876, 26/7214(a)(1)], witness tampering (18/1512-13), bribery (18/201(c), 203, 208, 209), and obstruction of justice (18/1503), in pursuit of an ultimately unsuccessful administrative and *in rem* forfeiture attempt.

Essentially, Defendants engaged in an extensive conspiracy to deprive the Vosburgh family of their property and rights (18/241, 654, 1951, 1961-62). There has been an ongoing coverup effort.

Between July 1992 and April 1996, Defendants issued at least 61 "grand jury" subpoenas, primarily to procure the Vosburghs' protected financial records, without convening a grand jury.

Defendants served "grand jury" subpoenas on record holders who were "commanded" to bring certain "document(s) or objects" and to "appear and testify before the Grand Jury."

No grand jury was convened, however, until more than four years after the first bogus subpoenas were served. Record holders never discovered this fraud because each, without exception, took advantage of the option each subpoena offered to simply mail documents to Defendant Agent Welch.

Both Defendant Stuckey (by sealed, ex-parte affidavit and verified motion) and Defendant Robinson (in repeated court appearances and court documents during four years), stated that a "grand jury was convened in good faith" and the subpoenaed documents had been "presented to the federal grand jury."

The Vosburghs did not obtain the March 1992 sealed affidavit until more than a year after it was filed and after the seizure. In 1997, more than two years after this suit was filed, the Vosburghs first obtained evidence there was no grand jury involvement during the four years while defendants issued the 61 "grand jury" subpoenas for their administrative and *in rem* forfeiture attempt.

Defendants did not initiate a criminal action until three and one-half years after their wrongful seizure of the Vosburghs' funds. Only after losing the *in rem* forfeiture did the government finally take its case to a grand jury (for a couple of hours in one afternoon) in September 1996.

The Vosburghs filed this action on 4-12-95, one and one-half years before the Defendants first sought an indictment. Mr. Vosburgh was eventually indicted for "tax evasion" (which the government dismissed after Defendants failed to secure a conviction) and 5 counts of "structuring" financial transactions.

Defendants' actions in obtaining the Indictment and subsequent conduct are not a subject of the Vosburghs' civil action.

Defendants made the false affidavit and statements to allow the Civil Division to use subpoenaed records to pursue *in rem* forfeiture against the life-savings of William Vosburgh, his sister, Sandra Vosburgh, and their now 86-year-old mother, Margaret Vosburgh, consisting of a computer system, funds in brokerage accounts and currency found during a home search totaling several hundred thousand dollars in value.

The search and seizure warrants were obtained by Defendant Agent Welch with assistance and supervision from Defendants AUSAs Stuckey and Westphal.

Welch stated in his affidavits that William Vosburgh had not filed tax returns for 13 years, suggested Vosburgh was a "professional money launderer" working with "associates" and claimed Welch was unable to trace an "unexplained difference" of over $100,000.

Welch created the bogus "difference" by manipulating data, obtained with "grand Jury" subpoenas, to mislead the magistrate. Welch acknowledged he knew each statement was false in a deposition taken more than a month after this case was filed.

On 4-16-93, Defendant Moore, a City of Beaverton undercover narcotics detective, joined other Defendants and searched and seized property in the Vosburghs' home. The search warrant obtained by Defendant Welch is addressed, "To Any Special Agent, IRS-CID and any Authorized Officer of the United States..."

Moore was not deputized as a federal agent and entered and searched without warrant authority. The City of Beaverton applied for 10% of the funds unlawfully seized from the Vosburghs' home. The vast majority of items seized were not listed on the warrant, and were never returned.

Seven months after the April 1993 seizure, Defendants filed an *in rem* forfeiture complaint alleging that William Vosburgh deposit-

ed Postal money orders into brokerage accounts, "violating" Title 31 Money and Banking regulations for Currency Transaction Reports.

Defendants never acknowledged that brokerage accounts do not accept currency for deposit and **money orders are exempt from reporting requirements**. Almost 4 years later, the funds were returned to the Vosburghs by court order.

The district court's order to return the Vosburghs' funds was based on the 8th Amendment's excessive fines clause. The funds were not an instrumentality of a crime. The lack of probable cause for the wrongful seizure was not resolved because the government succeeded in getting the Vosburghs' forfeiture cross-appeal dismissed as "moot."

Defendants' four-year detention of the funds prevented the Vosburghs from purchasing a replacement home within two years to eliminate the tax liability from their 1991 home sale and amending the tax return within the 3 years allowed. Seizure of the family's funds also prevented the Vosburghs from paying the $47,000 tax which has grown to over $95,000 with interest and penalties.

During the pending administrative and *in rem* forfeiture, Criminal Division AUSA Robinson attempted to extort two-thirds of the Vosburghs' wrongfully seized funds, a hold-harmless agreement and testimony from Sandra Vosburgh, in exchange for return of one-third of the family's life-savings.

Defendant AUSAs Westphal and Stuckey acted in collusion, stalled the administrative forfeiture proceedings for seven months and evaded a probable cause hearing for four years to put emotional, psychological and financial pressure on the Vosburghs to accept Robinson's mailed and phoned extortion attempts.

Defendants Robinson and Stuckey did not provide copies of the letters or report the phone calls to the court.

The U.S. attorney did not issue a certification that any of the defendants had acted within the scope of their employment.

These facts are undisputed and are supported by Defendants' affidavits. Instead of answering the Vosburghs' Complaint, Defendants claimed, and were given, immunity.

Basis for Federal Jurisdiction in District Court

Plaintiffs invoked the jurisdiction of the district court pursuant to 28 U.S.C. § 1331, *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 US 388, 29 L.Ed.2d 619, 91 S.Ct.1999 (1971), the *Savings to Suitors Clause* in 28 U.S.C. §1333(1) and the Judiciary Act of 1789, §§ 9 & 16.

This action raised federal questions and was brought pursuant to the 1st, 4th, 5th, 6th, 8th & 14th Amendments as well as Article I, §1 & §8, Cl. 18 and Article I, §9, Cl. 3 of the U.S. Constitution.

Jurisdiction was proper to decide issues of federal law under Title 18 U.S.C. §§ 981(a)(1), 1951, 1961 et seq., 31 U.S.C. §5313 and the Right To Financial Privacy Act.

Jurisdiction concerning only Beaverton Police officer Thomas J. Moore was also invoked pursuant to Title 42 U.S.C. §§1983, 1988 and 28 U.S.C. § 1343(a)(3).

Jurisdiction for declaratory relief was invoked pursuant to Title 28 U.S.C. § 2201(a).

Plaintiffs invoked the court's pendent jurisdiction for claims arising from identical actions by identical defendants which comprise violations of both federal and state law.

ARGUMENT

INTRODUCTION

The Vosburghs seek review by this Court because the Ninth Circuit granted Defendants immunity for criminal conduct without satisfying either of this Court's two requirements for immunity.

This Court has established two degrees of official immunity with their associated and limiting requirements:

1) Absolute immunity for "conduct within the scope of official duties" and "intimately associated with the judicial process;" and,
2) Qualified immunity for "conduct within the scope of official duties" while acting pursuant to "a reasonable belief such conduct was lawful."

The Vosburghs argue that even if the criminal conduct could be construed to be "intimately associated with the judicial process," criminal conduct can never be "within the scope of official duties."

The Ninth Circuit decision, giving immunity for criminal conduct, creates an unacceptable result. If criminal conduct is "within the scope of official duties," then government itself is a criminal enterprise.

The Vosburghs seek a restatement by this Court of the bright-line test and doctrine espoused in *Ex parte Virginia* (1880) and reiterated in *Gravel* (1972) and *O'Shea* (1974). The Ninth Circuit repudiated this Court's doctrine that criminal conduct removes the cloak of immunity.

FIRST QUESTION

Did the Ninth Circuit go too far in expanding absolute and qualified immunity for criminal conduct; which, is not intimately associated with the judicial process, committed four years before initiating a criminal prosecution, in a conspiracy motivated by potential personal economic benefits from administrative forfeiture?

A. Failure To Exclude Criminal Conduct From Acts Deemed Within The Scope Of Official Duties Violates Supreme Court Doctrine Since 1880 As Reiterated In *Gravel* and *O'Shea.*

The Circuit's Decision, Appendix A @ 3 says,

> "[w]e agree that absolute immunity bars Plaintiffs' *Bivens* claims for damages against Defendants Stuckey, Robinson, and Westphal. All three are Assistant United States Attorneys, a position traditionally accorded absolute immunity, and all of their actions were taken in preparation of the criminal prosecution and the civil forfeiture proceeding."

The Decision overlooks and/or fails to address the gross criminal nature of Defendants' actions and the pervasive conspiracy to deprive the Vosburghs of their money and their rights. The Circuit focused on Defendant's positions rather than their actions. Consequently, the Decision effectively negates Supreme Court doctrine espoused in *O'Shea v. Littleton*, 414 U.S. 488, 503 (1974) and *Gravel v. United States*, 408 U.S. 606, 627, 92 S.Ct. 2614, 2628, 33 L.Ed.2d 583 (1972).

Since at least 1880, the Supreme Court has consistently distinguished between negligent conduct and intentional criminal conduct for the purpose of immunity for government officials.

> "Whatever may be the case with respect to civil liability generally [cites omitted], or civil liability for willful corruption [cites omitted], **we have never held that the performance of the duties of** judicial, legislative, or **executive officers, requires or contemplates the immunization of otherwise criminal deprivation of constitutional rights.** Cv. *Ex parte Virginia*, 100 U.S. 339, 25 L.Ed. 676 (1880). **On the contrary, the judicially fashioned doctrine of official immunity does not reach 'so far as to immunize criminal conduct proscribed by an Act of Congress....'** *Gravel v. United States*, 408 U.S. 606, 627, 92 S.Ct. 2614, 2628, 33 L.Ed.2d 583 (1972)." *O'Shea v. Littleton*, 414 U.S. 488, 503 (1974) (emphasis added)

Gravel recognized limits on even the Constitutional exemption from liability or criminal process for Members of Congress. *Gravel* draws a distinction between official acts which are protected and criminal conduct which is not protected.

> There are additional considerations. Article I, § 6, cl. 1, as we have emphasized, **does <u>not</u> purport to confer a**

> **general exemption** upon members of Congress **from liability** or process in criminal cases. **Quite the contrary is true.** While the Speech or Debate Clause recognizes speech, voting, and other legislative acts as exempt from liability that might otherwise attach, **it does <u>not</u> privilege either** Senator or aide **to violate an otherwise valid criminal law** in preparing for or implementing legislative acts. *Gravel,* U.S. @ 626.

Since 1880, the Supreme Court has consistently drawn a distinction between lawful and unlawful conduct in pursuit of official duties. "We do not perceive how holding an office under a State, and claiming to act for the state, can relieve the holder from obligation to obey the Constitution of the United States, or take away the power of Congress to punish his disobedience." *Ex parte Virginia*, U.S. @ 348.

As *Virginia* held, whether acts done by Defendants were prosecutorial or not is to be determined by their character, and not by the character of the agent.

Even if extortion, perjury, subornation of perjury, witness tampering, bribery and conspiracy to violate rights and seize property could be considered in any case to be prosecutorial acts, can these acts be considered such when they acted outside of their authority and in direct violation of the law? The criminal codes give Defendants no authority to violate the law and give no exemption from the law. Violation of criminal law was not left within the limits of Defendants' discretion. [Paraphrasing *Virginia*, @ 348]

The Supreme Court has made it clear that officials do not have immunity from civil liability and are not exempt from prosecution for their criminal conduct.

> "...**no prior case has held** that members of Congress **would be immune if they** executed an invalid resolution by themselves carrying out an illegal arrest, or if, in order to secure information for a hearing, themselves **seized the property or invaded the privacy of a citizen. <u>Neither</u>** they nor their aides **<u>should be immune from liability</u> or questioning in such circumstances."** *Gravel, U.S.* @ 621.

Nor is conduct "within the scope of employment" a complete protection or even the deciding factor.

"This view places beyond the Speech or Debate Clause a variety of services characteristically performed by aides for Members of Congress, **even though within the scope of their employment. It likewise provides no protection for criminal conduct threatening the security of the person or property of others,...**" *Gravel*, U.S. @ 622.

"...we cannot carry a judicially fashioned privilege so far as to immunize criminal conduct proscribed by an Act of Congress..." *Gravel* U.S. @ 627. (emphasis added)

The Supreme Court has never overruled, vacated, reversed, repudiated, modified, criticized, limited or even questioned the principle laid out in head note 19 in *O'Shea*. Judicial policy of the United States still prohibits civil immunity for criminal conduct. The Court in *Gravel* denied civil immunity for criminal acts by "judicial, legislative, or executive officers." *Gravel,* U.S. @ 627; *O'Shea*, U.S. @ 503.

Gravel established that even the specific Constitutional immunity for Members of Congress does not extend to criminal acts. Executive agents and officers have no such Constitutional immunity for any act whatsoever.

The executive privilege that Defendants claim of civil immunity for criminal conduct — nowhere made explicit in the Constitution — and absent from the common law, is necessarily subordinate to the express commands of criminal laws and protected rights of citizens.

Intentional criminal conduct, in contrast to negligent conduct or even malicious prosecution, has no history of common-law immunity that can be extended to *Bivens* or Title 42 U.S.C. §1983 actions.

B. Expansion Of Immunity Violates Federal Law & Congressional Intent

The Civil Rights Act of 1871 (now title 42 USC § 1983), made every party damaged by violation of his protected rights, a private attorney general to enforce the law and to defend his rights. Congress recognized that the injured party is the only party who has the incentive and motivation to prosecute for wrongs done to him.

In addition to imposing liability on "every person" in § 1983, **Congress specifically imposed liability whenever property is returned that was seized for forfeiture, unless, "the court shall cause a proper certificate (of reasonable cause) to be entered." 28 USC § 2465. Without the certificate, Congress imposed liability on "the person who made the seizure" and "the prosecutor" and made them "liable to suit or judgment" on account of the wrongful seizure.**

A certificate of reasonable cause was not issued in this case.

Defendants seized and sought to forfeit funds in two brokerage accounts. The funds were deposited with postal money orders. Defendants alleged those deposits violated the Currency Transaction Reporting requirements. However, PMOs are not currency and are exempt from the reporting requirements. There was no probable cause for seizing the funds.

In addition, the computer system seized and listed for forfeiture was not even mentioned in Defendant Agent Welch's affidavit for the seizure warrants. Again, there was no probable cause for seizing the computer system.

C. Failure To Exclude Criminal Conduct From Acts Deemed Within The Scope Of Official Duties For Civil Immunity Makes Judicial Doctrine The Cause Of Criminal Conduct.

The judicial doctrine of immunity says government officials have either absolute or qualified immunity for acts within the scope of their official duties. If an official is given immunity for criminal conduct, the criminal conduct must be within the scope of his official duties, making government itself a criminal enterprise.

Without personal liability for criminal conduct motivated by personal economic benefits, there is no judicial or institutional mechanism to correct the growing criminal conduct by government employees in the U.S. Department of Justice. The judicial system does more than aid and abet in those crimes. The judicial doctrine of immunity is the cause. Law-enforcement "enhancements" from *in rem* forfeiture provides the motive and potential reward.

Failure to distinguish between negligence or malicious prosecution on the one hand and criminal conduct on the other, causes criminal conduct and the resulting injustice which courts have a duty to prevent by providing a known remedy.

SECOND QUESTION

If *in rem* forfeiture proceedings are not "prosecutions" for 5th Amendment Double Jeopardy purposes (per *Ursery*), is initiating seizure and administrative forfeiture a "prosecution" for prosecutorial immunity purposes under the 5th Amendment's Due Process clause and Equal Protection component?

The Court should establish that failure to exclude criminal conduct from acts deemed within the scope of official duties denies equal protection of the laws.

Equal protection of the laws is protected under the Fifth Amendment's due process clause. Civil immunity for criminal conduct by government employees denies the right to petition for redress. Denial of the right to petition for redress violates equal protection. Denial of equal protection denies due process.

The Decision, granting civil immunity for criminal conduct, violates the principle of equal protection of the laws. Courts and prosecutors can treat different classes of persons in different ways but not on the basis of arbitrary or unreasonable criteria wholly unrelated to the objective of that policy.

Where the constitutionally protected right of redress of grievance is involved, constitutionality of judicial policy or doctrine must be judged by the stricter standard of whether the policy promotes a compelling governmental interest.

Equal protection does not require identity of treatment, but only:

(1) that classification rests on real and not feigned differences,
(2) that the distinctions have some relevance to purpose for which the classification is made, and
(3) that the different treatments be not so disparate, relative to difference in classification, as to be wholly arbitrary.

The court's grant of immunity for criminal conduct by government lawyers and agents must not be arbitrary and must be based upon a substantial relation to a legitimate object to be accomplished.

Immunity for criminal conduct creates a divided, adversarial, two-class society completely of the judiciary's making: criminal government employees who victimize, and citizens left without a judicial remedy for escalating injustice caused by official immunity.

The Decision clearly violates:

> the **First Amendment right** to petition for redress of grievance;
> the **Fourth Amendment right** to be secure in our persons, houses, papers and effects, against unreasonable searches and seizures;
> the **Fifth Amendment right** not to be deprived of life, liberty or property without due process of law and the right not to have private property taken for public use without just compensation.

The Decision destroys the ability to protect, defend and enforce any protected right.

Expanding civil immunity to criminal conduct fails to promote a compelling governmental interest and is an arbitrary, unreasonable and unjustified violation of the right to equal protection of the laws.

THIRD QUESTION

Does the Ninth Circuit misapprehend *Imbler v. Pachtman*, and encourage malicious prosecution, by expanding immunity retroactively for Executive officers' criminal conduct committed prior to initiating a criminal prosecution?

A. Failure To Exclude Criminal Conduct From Acts Deemed Within The Scope Of Official Duties For Civil Immunity Misapprehends *Imbler.*

> The Circuit's Decision, Appendix A @ 3 says,
> "[w]e agree that absolute immunity bars Plaintiffs' *Bivens'* claims for damages against Defendants Stuckey, Robinson, and Westphal. All three are Assistant United States Attorneys, a position traditionally accorded absolute immunity, and all of their actions were taken in preparation of the criminal prosecution and the civil forfeiture proceeding. See *Imbler v. Pachtman,* 424 U.S. 409, 431 (1976); *Demery v. Kupperman,* 735 F.2d 1139, 1143 (9th Cir. 1984)."

The Decision misapprehends the nature of this action and misapprehends *Imbler v. Pachtman. Imbler* merely extended a common-law privilege, absolute prosecutorial immunity for malicious prosecution, to actions under 42 U.S.C. §1983.

As the facts in *Imbler* suggest, and the quote from Judge

Learned Hand [U.S. @ 428] implies, it is easy to allege "malicious prosecution" in virtually any case that fails to result in conviction.

Imbler does not create, grant or support immunity for criminal conduct. Rather, *Imbler* specifically limits prosecutors' absolute immunity, "within the scope of his duties in initiating and pursuing (presenting) a criminal prosecution" [U.S. @ 420 & 431]. Because *Imbler* is a malicious prosecution case, *Imbler* is off-point.

This is not a case seeking damages for "initiating and pursuing a criminal prosecution." The Vosburghs did not sue for malicious prosecution and filed this action a year and a half before Defendants ever sought or obtained an indictment.

Defendants' conduct in this case took place up to four and a half years before an indictment was sought against Mr. Vosburgh to cover-up or justify their unsuccessful criminal conduct.

Unlike the subjective allegations of antagonistic intent constituting malicious prosecution in *Imbler*, the Vosburghs allege intentional commission of a pattern of criminal conduct.

The Decision overlooks *Gravel* @ 627 and *O'Shea* @ 503. Especially in light of those two cases, it is clear that the Decision misapprehends *Imbler*.

The Vosburghs' allegations are supported by specific, objective facts and documentary evidence including affidavits from Defendants.

B. Expansion Of Immunity Changes Judicial System & Government

The Ninth Circuit expanded the evolving doctrine of immunity beyond two major limits this Court established in its opinions. The Ninth Circuit granted immunity, (1) for criminal conduct, rather than malicious prosecution, and, (2) for criminal conduct committed up to four years before Defendants initiated a criminal prosecution. Defendants' criminal conduct was not, "intimately associated with the judicial process."

Defendants stated almost two dozen times in affidavits that their acts were committed while "investigating" and never claimed to have been prosecuting.

Expansion of immunity to criminal conduct not intimately associated with the judicial process is not supported by the common law

or by prior opinions of this Court. The Ninth Circuit failed to provide any philosophical foundation for the expansion.

Expansion of immunity for criminal conduct is a far-reaching and destructive judicial doctrine that will fundamentally change the very nature of government. If judicial remedies are foreclosed, the judicial system loses its credibility, purpose and legitimate function.

The Ninth Circuit has overthrown an ancient, and one of the most valued, maxims of law: "Every wrong has a remedy." The Ninth Circuit not only eliminated the remedy for the fastest growing type of wrong, but provided an incentive that inspires the wrongdoing. There can be no question that giving immunity for criminal conduct inspires criminal conduct.

The founding documents and Constitution established a government of limited and enumerated powers. The Ninth Circuit's expansion of immunity creates a government of unlimited powers that are subject to abuse by irresponsible and unaccountable agents.

The Ninth Circuit's decisions fundamentally alters the relationship between citizens and their government and alters the nature of government. The decision eliminates the judicial remedy and offers no alternative.

C. Alternative Remedies Ineffective

The Court should re-examine and reassess the alternative remedies for wrongful conduct the Court discussed in *Imbler.*

DOJ's Office of Professional Responsibility and Bar Associations do not have credibility; their own statistics clearly document that these institutions simply do not work for the protection of the public.

These institutions do not work because they have no vested interest in investigating or prosecuting the home team. The institutional culture is infected with, and pre-disposed to, the same abuse of power and rationalization that government lawyers and agents use to justify criminal conduct. These are the fellow workers and dues-paying members of the professional over-sight agencies, boards and associations with the duty to oversee.

The Bar Associations that administer their own liability funds have no incentive to find Bar members liable and seldom take any disciplinary action. The statistics on complaints and actions taken on complaints is impressive evidence of vested interests working against the public interest.

Defendant AUSA Robinson has never been a State Bar Association member in any of the three different states where he has been employed as an AUSA. State Bar membership is not required by policy of the U.S. Attorney for the District of Oregon.

It is well established and widely recognized that prosecutors do not prosecute fellow prosecutors, nor do they prosecute the agents from whom prosecutors suborn perjury and other criminal conduct. The Ninth Circuit expanded the judicial doctrine of civil immunity which is built on top of the existing exemption from criminal prosecution. Exemption from prosecution might be unofficial, but is widely practiced and well established.

"Win at all Costs," a ten-part series subtitled, "Government Misconduct In The Name Of Expedient Justice," was published last November and December by the Pittsburgh Post-Gazette and later featured on national television. This 93-page series documented the results of a two-year investigation of criminal conduct by federal prosecutors throughout the country and could have been subtitled, "The Consequences of Immunity."

Following this shocking revelation of prosecutorial abuses and misconduct, not a single government employee has been disciplined or criminally prosecuted.

Government lawyers, who have no philosophical or ethical qualms about committing crimes in the name of enforcing statutes, now have no legal liability for doing so.

In *Imbler,* the Court said, "the checks undermine the argument that the imposition of civil liability is the only way to insure that prosecutors are mindful of the constitutional rights of persons accused of crime" [424 US, §§ 428-29]. The Court should re-examine that conclusion in the harsh light of reality after more than twenty years of an evolving doctrine of immunity.

PROCEDURAL DUE PROCESS DENIED

1. The decision that the Court lacks jurisdiction over the United States, misapprehends the nature of the Complaint, and conflicts with prior Circuit decisions on official capacity suits.

> The Circuit's Decision, Appendix A @ 4 says,
> "...the district court properly dismissed these claims (injunctive or declaratory relief) as they are not justiciable. * * * ...any property being held is held—not by these individual Defendants—but presumably by the United States and its agencies. Thus, any injunctive relief awarded against these Defendants would not redress Plaintiffs' alleged injury."

Each defendant is sued in his official capacity as well as his individual capacity. See ER, Exh. A, First Amended Complaint, ¶¶ 13-19. Thus, the United States and its agencies are parties to this action. The court has jurisdiction to issue declaratory and injunctive relief and to order return of property whether unlawfully detained by Defendants individually or by the United States.

Defendants argued, and the Vosburghs agree, "Plaintiffs' failure to name the United States as a defendant does not prevent this filing from being, in effect, a claim against the United States. *Gilbert v. DaGrossa*, 756 F.2d 1455, 1458 (9th Cir. 1985). 'A suit against [federal] employees in their official capacity is essentially a suit against the United States.'" See Defendants' Memorandum In Support Of Motion To Dismiss, (CR 41), p. 4. Also see the Vosburghs' Opposition To Defendants' Motion To Dismiss, (CR 50), pp. 2-8.

Thus, the panel's Decision @ 4, that the United States is not a party for purpose of declaratory and injunctive relief, is at odds with the position of both the Vosburghs and Defendants, and conflicts with prior Circuit authority in *Gilbert*.

On 1-28-99, an Order was filed to recall the mandate issued 1-5-99 in error. That Order acknowledges "The government is a party to this action." See Appendix C. This suggests the Decision, dismissing claims for injunctive and declaratory relief, is also error.

The Court should reverse the Decision and remand for injunctive and declaratory relief because the Vosburghs' official capacity claims for such are justiciable. Pursuant to FRAP

35(a)(1), reversal is necessary to secure or maintain uniformity of this Circuit's decisions with *Gilbert.*

2. Failure to allow pro se plaintiffs to amend, refile or file a new Complaint after exhaustion, denies due process.

The Circuit's Decision, Appendix A @ 5 says,
"In the present case, because **Plaintiffs failed to allege that the federal Defendants committed any of the alleged torts outside of the scope of their employment,** the court properly considered the tort claims as against the United States." (emphasis added)

The district court was, of course inconsistent. For purpose of declaratory and injunctive relief, the court overlooked the fact that Defendants were sued in their official capacity as well as their individual capacity. See point 1 (above) regarding procedural due process denied. For purpose of the tort claims, the court considered those as claims against the United States.

The Vosburghs considered their allegations clearly describe conduct outside the scope of employment. Any defect in wording of the Complaint and other problems could be easily corrected in an amended complaint. Defendants did not file a single certificate that they acted **within** the scope of their employment. Defendants simply never raised the issue.

The Vosburghs were prejudiced when the district court dismissed rather than stayed the case while the remaining period for exhaustion of administrative remedies expired.

The Decision @ 5 and 1, incorrectly treats all tort claims as moot because a separate tort action was filed for a single incident which occurred on 4-13-95 while serving the present Complaint. At oral argument, counsel for Defendants misrepresented the nature of the second action and wrongly asserted that all tort claims had been duplicated in the second suit.

Plaintiffs made it abundantly clear that the second tort suit, against Defendant Welch for assault and battery on 4-13-95, was for only that single portion of the tort claims included in the present case. Therefore, the issue of exhaustion is not moot.

The suit was actually filed prematurely. This case involves ongoing conduct by Defendants that continued well after the

Complaint was filed in April, 1995. In addition, new evidence such as Defendants' own affidavits, and documents obtained in preparing the criminal case for trial in November 1997, were not available when the Complaint was filed.

The district court denied leave to amend. The Complaint was amended once as a matter of right under Fed.R.Cv.P. Rule 15(a) before a responsive pleading was served. See Vosburghs' Opening Brief @ 33-34 and Reply Brief @ 6-9, particularly @ 7. The Vosburghs were extremely prejudiced for each of the reasons given in their two briefs and were denied due process.

FRCvP Rule 15(a) provides that "leave (to amend) shall be freely given when justice so requires." The Court should allow the pro se plaintiffs to amend, refile or file a new Complaint on remand to a neutral court.

RELIEF SOUGHT

The Vosburghs seek:

A. A ruling from this Court that criminal conduct by government agents, especially when committed 4 years prior to seeking an indictment, not intimately associated with the judicial process, and motivated by potential personal economic benefits, is not within the scope of official conduct;

B. A ruling that equal protection of the laws requires that Defendants are individually liable for Defendants' criminal conduct;

C. Remand for declaratory judgment and injunctive relief for return of seized property;

D. Remand to reinstate the U.S. Government and City of Beaverton as defendants, or stay proceedings pending exhaustion of administrative remedies, and a ruling that the Ninth Circuit erred in holding government is not a party when agents are sued in their official as well as individual capacities, and;

E. Remand with leave to amend the Complaint based on the above rulings of this Court and evidence obtained since April 1995.

The Vosburghs do not seek suppression of evidence or reversal of a criminal conviction. The Vosburghs recognize government employees are exempt from criminal prosecution unless government has a political interest in prosecuting.

The Vosburghs seek the only meaningful remedy for criminal conduct by government agents which is to impose individual liability and accountability to the parties injured.

Respectfully submitted this 28th day of June, 1999.

Bill Vosburgh

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Margaret E. Vosburgh
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Petitioners, Pro Se

NOT FOR PUBLICATION

FILED
DEC. 24, 1998
CATHY A. CATTERSON,
CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILLIAM C. VOSBURGH;
MARGARET VOSBURGH;
SANDRA VOSBURGH

Plaintiffs-Appellants,

v.

TIMOTHY M. WELCH; THOMAS J. MOORE; IVETTE S. MCCOY; NATALIE J. BACHELDER; CHARLES W. STUCKEY; KENT S. ROBINSON; LESLIE J. WESTPHAL

Defendants-Appellees.

No. 97-35071

D.C. No.
CV-95-00454-ALH

MEMORANDUM*

Appeal from the United States District Court
for the District of Oregon
Ancer L. Haggerty, District Judge, Presiding

Argued and Submitted November 6, 1998
Portland, Oregon

Before: THOMPSON, TROTT, Circuit Judges, and
RHOADES, District Judge.**

Plaintiffs William Vosburgh, Sandra Vosburgh, and Margaret

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

**The Honorable John S. Rhoades, United States District Judge for the Southern District of California, sitting by designation.

Appendix A

Vosburgh ("Plaintiffs") filed a complaint against seven Defendants: federal Defendants Stuckey, Robinson, Westphal, Welch, McCoy, and Bachelder; and state Defendant Moore. Federal Defendants Stuckey, Robinson, and Westphal are all Assistant United States Attorneys, and Plaintiffs' causes of action against them stem from their initiation of a criminal tax evasion investigation, as well as a civil in rem forfeiture proceeding. The remaining Defendants are federal and state agents, and Plaintiffs' causes of action against these Defendants stem from their actions in executing a search warrant at Plaintiffs' residence.

In their complaint, Plaintiffs pled twenty-three causes of action, contending that Defendants committed state law torts, conspired to violate various state and federal statutes, and committed Bivens and 42 U.S.C. § 1983 violations. Plaintiffs seek damages, a declaratory judgment that Defendants violated their constitutional rights, and a mandatory injunction ordering Defendants to return property seized from them.

The district court granted federal Defendants' motion to dismiss and their motion for summary judgment. In addition, the court granted state Defendant Moore's motion for summary judgment. For the reasons stated below, we affirm the district court in part and remand in part.

1. Immunity as to Bivens and 42 U.S.C. § 1983 Claims.

Plaintiffs contend that the district court erred in dismissing their Bivens claims against federal Defendants Stuckey, Westphal, Robinson on the grounds that they were shielded by absolute immunity. Furthermore, Plaintiffs contend that the district court erred in granting summary judgment on the grounds that qualified immunity would shield federal Defendants Welch, McCoy, and Bachelder from the Bivens claims, and state Defendant Moore from the 42 U.S.C. § 1983 claims. This Court reviews those decisions de novo. See Pry v. Melaragno, 939 F.2d 832, 835 (9th Cir. 1991).

We agree that absolute immunity bars Plaintiffs' Bivens claims for damages against Defendants Stuckey, Robinson, and Westphal. All three are Assistant United States Attorneys, a position traditionally accorded absolute immunity, and all of their actions were taken in preparation of the criminal prosecution and the civil forfeiture proceeding. See Imbler v. Pachtman, 424 U.S. 409, 431 (1976);

Demery v. Kupperman, 735 F.2d 1139, 1143 (9th Cir. 1984).

Furthermore, qualified immunity bars Plaintiffs' Bivens claims against federal Defendants Welch, McCoy, and Bachelder, as well as Plaintiffs' 42 U.S.C. § 1983 claims against state Defendant Moore. All of these Defendants are entitled to qualified immunity, as they could have reasonably concluded that they lawfully executed the search warrant. See Harlow v.Fitzgerald, 457 U. S. 800, 818 (1982); Act Up! /Portland v. Bagley, 988 F.2d 868, 871 (9th Cir. 1993).

Neither absolute nor qualified immunity bars Plaintiffs' claims for injunctive or declaratory relief. See Fry, 939 F.2d at 839. However, the district court properly dismissed these claims as they are not justiciable. The claim for injunctive relief requests that the Defendants return property seized for use in the criminal investigation and the civil forfeiture. While there is currently a dispute as to whether such property has been returned, any property being held is held—not by these individual Defendants—but presumably by the United States and its agencies. Thus, any injunctive relief awarded against these Defendants would not redress Plaintiffs' alleged injury. See Coakley v. Sunn, 895 F.2d 604, 606 (9th Cir. 1990) (explaining that standing requires that the injury alleged is "apt to be redressed by a remedy that the court is prepared to give"). Furthermore, Plaintiffs' claim for declaratory relief does not present a justiciable controversy, as such relief would not redress any past harm that Plaintiffs allegedly suffered. Id. Thus, the district court properly held that immunity would bar Plaintiffs' Bivens claims against the federal Defendants, and the 42 U.S.C. § 1983 claims against state Defendant Moore.

2. Dismissal of Tort Claims.

Plaintiffs challenge the district court's dismissal of their tort claims against the federal Defendants for failure to exhaust their administrative remedies under the Federal Tort Claims Act ("F.T.C.A."). We review the district court's dismissal de novo. See Meridian Int'l Logistics, Inc. v. United States, 939 F.2d 740, 742 (9th Cir. 1991).

In the present case, because Plaintiffs failed to allege that the federal Defendants committed any of the alleged torts outside of the

scope of their employment, the court properly considered the tort claims as against the United States.[1] See Bruns v. National Credit Union Admin., 122 F.3d 1251, 1254 (9th Cir. 1997); Gilbert v. DaGrossa, 756 F.2d 1455, 1458 (9th Cir. 1985). Under the F.T.C.A., a plaintiff must first file a claim with an appropriate administrative agency and wait until that agency has denied the claim, or six months has passed, before initiating suit against the United States. See 28 U.S.C. § 2675(a). Failure to comply with this statutory requirement deprives federal district courts of subject matter jurisdiction to hear the case. See Jerves v. United States, 966 F.2d 517, 519 (9th Cir. 1992). Because Plaintiffs filed their complaint before an agency had rendered a decision on their claims, or six months had passed, the district court properly dismissed the tort claims for lack of subject matter jurisdiction.

The F.T.C.A. exhaustion requirement would not bar any of the tort causes of action against state Defendant Moore. However, because qualified immunity bars the federal 42 U.S.C. § 1983 claims against him, we remand the state tort causes of action to the district court and direct it to dismiss the claims without prejudice for lack of subject matter jurisdiction. See 28 U.S.C. § 1367 (c) (3) ; Reynolds v. County of San Diego, 84 F. 3d 1162, 1171 (9th Cir. 1996).

3. District Court Errors.

Plaintiffs claim the district court erred in refusing to command the United States Attorney ("USA") to conduct a special grand jury investigation. District courts have the discretion to order the USA to initiate such an investigation. See Simpson v. Reno, 902 F. Supp. 254, 256 (D.D.C. 1995); see also Korman v. United States, 486 F.2d 926, 933 (7th Cir. 1973). Given this discretion, Plaintiffs' mere allegations that Defendants committed numerous crimes did not compel the district court to order a special grand jury investigation.

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[1] At oral argument, the United States tardily informed us that Plaintiffs have since filed a second tort suit against Defendant Welch which complies with the F.T.C.A.'s exhaustion requirements. See Vosburgh v. United States, No. CV 97-547-JO. Therefore, because the issue of exhaustion of remedies is now moot, we decline to consider whether the Court properly dismissed the tort causes of action against Defendant Welch. We note, however, that the government's failure to provide this information to us sooner unnecessarily complicated our consideration of this case.

Furthermore, the district court judge did not err in refusing to recuse himself. Plaintiffs allege that the judge demonstrated active bias against them by repeatedly favoring the Defendants' positions, refusing to convene a grand jury investigation, and by instructing grand jurors not to speak to Plaintiff William Vosburgh outside of grand jury proceedings. However, Plaintiffs have failed to demonstrate that the judge's alleged bias stemmed from an extrajudicial source, or that his judicial rulings reflected such antagonism as to prevent fair judgment. See Liteky v. United States, 510 U.S. 540, 556 (1994)

Finally, the district court did not err in refusing to allow Plaintiffs to file an amended complaint. We recognize that the Federal Rules of Civil Procedure encourage district courts to permit leave to amend freely when justice so requires. See Fed. R. Civ. P. 15(a). However, in denying the present request, the court noted that amendment would substantially prejudice Defendants by forcing them to amend a motion to dismiss which had been scheduled for an impending hearing. Furthermore, the court also determined that, even if permitted, the second amended complaint would not have cured Plaintiffs' pleading deficiencies.

See Ashelman v. Pope, 793 F.2d 1072, 1078 (9th Cir. 1986). Given these findings, the district court did not abuse its discretion in denying Plaintiffs motion to amend their pleadings.

For the reasons stated, the decision of the district court is AFFIRMED in part and REMANDED in part.

EACH PARTY TO BEAR ITS OWN COSTS.

Entered on the Docket on
9/30/96
DONALD M. CINNAMOND

FILED
1996 SEP 27 P 3:40

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

WILLIAM C. VOSBURGH, MARGARET E. VOSBURGH, and SANDRA J. VOSBURGH,

Plaintiffs,

TIMOTHY M. WELCH, THOMAS J. MOORE, IVETTE S. MCCOY, NATALIE J. BACHELDER, CHARLES W. STUCKEY, KENT S. ROBINSON, LESLIE J. WESTPHAL, JOHN DOES #1-15, and JANE DOES #1-12,

Defendants

Civil No. 95-454 HA

OPINION AND ORDER

William C. Vosburgh
Margaret E. Vosburgh
Sandra J. Vosburgh
8920 S. W. Barnes Road
Portland, Oregon 97225

Pro se Plaintiffs,

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Attorneys for Federal Defendants.

Appendix B

William B. Kirby
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Attorney for Defendant Moore

HAGGERTY, Judge:

The matters before the court are federal defendant's motion to dismiss or in the alternative, motion for summary Judgment; Federal defendant's motion to dismiss, and defendant Moore's motion for summary judgment.

BACKGROUND

The plaintiffs are related. Margaret Vosburgh is the mother of William and Sandra Vosburgh. William Vosburgh was believed to be involved in money laundering as well as tax evasion from the sale of certain property. On or about April 15, 1993, United States Magistrate Judge Donald C. Ashmanskas issued a search warrant for the Vosburgh residence. On or about April 16, 1993, several federal agents and a member of the Beaverton Police Department (defendant Moore) executed the warrant. It is undisputed that defendant Welch knocked on plaintiffs' door several times. Although the door remained closed, a person later identified as William Vosburgh asked agent Welch to identify himself. Agent Welch then displayed his governmental credentials through a window. Agent Welch again informed defendant William Vosburgh of the fact that he had a search warrant and again requested that he open the door. Mr. Vosburgh indicated that he would not open the door and therefore, the front door was forcibly opened. The agents then searched the residence and seized boxes containing books and documents, a personal computer, and $101,600 in cash.

Plaintiffs filed this action in April of 1995 against the agents who obtained the warrant and executed the search. Plaintiffs allege that the agents violated the United States Constitution and certain statutes in obtaining the warrant, executing the warrant, and seizing

the property. Specifically, there are 23 causes of action pled. However, it is very difficult to discern the precise basis of each of plaintiffs' causes of action. Plaintiffs seek declaratory relief, monetary damages, and the return of property.

LEGAL STANDARDS

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The materiality of a fact is determined by the substantive law on the issue. T.W. Elec. Serv., Inc. v. Pacific Electrical Contractors Asso., 809 F.2d 626, 630 (9th Cir. 1987). The authenticity of a dispute is determined by whether the evidence is such that a reasonable jury could return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 317, 323 (1986).

The moving party has the burden of establishing the absence of a genuine issue of material fact. Celotex Corp. V. Catrett, 477 U.S. 317, 323 (1986). If the moving party shows the absence of a genuine issue of material fact, the non-moving party must go beyond the pleadings and identify facts which show a genuine issue for trial. Id. at 324.

Special rules of construction apply to evaluating summary judgment motions: (1) all reasonable doubts as to the existence of genuine issues of material fact should be resolved against the moving party; and (2) all inferences to be drawn from the underlying facts must be viewed in the light most favorable to the non-moving party. T.W. Electrical. 809 F.2d at 630.

Fed. R. Civ. P. 56(e) provides when a motion for summary judgment has been made and supported as provided in the rules, the adverse party may not rest upon mere allegations or denials, but must, by affidavit or other legally provided method, set forth specific facts showing that there is a genuine issue for trial; if the adverse party does not so respond, summary judgment is to be entered. The Ninth Circuit has recognized that where a pro-se litigant is involved, the court should treat it as if the party was represented insofar as the rules of court in construing a motion for summary judgment. Jacobsen v. Filler, 790 F.2d 1362 1364, 1365 (9th Cir. 1985).

ABSOLUTE IMMUNITY

Federal defendants Stuckey, Robinson and Westphal, all AUSAs, assert that they are entitled to absolute immunity from plaintiffs' constitutional and tort claims. Absolute immunity is available to persons whose functions are intimately or closely associated with the judicial process. Burns v. Reed, 500 U.S. 478, 479 (1991). "Absolute immunity is designed to free the judicial process from the harassment and intimidation associated with litigation." Id. at 494. (Emphasis deleted).

The federal defendants rely on Imbler v. Pachtman, 424 U.S. 409 (1976) for the proposition of immunity for prosecutors. Therein, the court held "in initiating a prosecution and in presenting the [government's] case, the prosecutor is immune from a civil suit for damages..." Id. at 431. The immunity extends to any activities of the prosecutor "intimately associated with the judicial phase of the criminal process . . ." Id. at 430. The Supreme Court has also extended absolute immunity to all pretrial court appearances by a prosecutor in furtherance of a criminal prosecution. Burns, 500 U.S. at 492.

In addition, federal defendants argue that courts are in general agreement: "policy considerations favor a liberal application of immunity" where quasi-judicial functions are involved and the prosecutor was acting within the colorable claim of authority. Ashelman v. Pope, 793 F.2d 1072, 1078 (9th Cir. 1986). This court is of the opinion that the AUSAs are protected by absolute immunity for their conduct and therefore, the plaintiffs' complaint as to these defendants are dismissed with prejudice. See Fry v. Melaragno, 939 F.2d 832 (9th Cir. 1991). Furthermore, since all of the allegations against the AUSAs pertain to their employment, they are also entitled to have plaintiffs' complaint dismissed under the doctrine of qualified immunity. The same is true with respect to defendants, Welch, Moore, McCoy, and Batchelder. Act UP!/Portland v. Bagley, 971 F.2d 298, 301 (9th Cir. 1992). A defendant's qualified immunity claim must be supported by his reasonable belief that his conduct was lawful. Id. at 300-301. Plaintiffs' claim that the defendants violated their constitutionally protected right from illegal searches and seizures. However, in obtaining and executing the warrant, the defendants assert that they acted with belief that their conduct was lawful and at no time exceeded the parameters of the warrant.

Furthermore, plaintiffs have not shown that defendants believed they were acting unlawfully.

FEDERAL DEFENDANT'S MOTION TO DISMISS

A pleading filed in a federal civil action must contain "a short and plain statement of the claim showing that the pleader is entitled to relief. . . ." Fed. R. Civ. P. 8 (a) (2) . The federal defendants argue that to the extent that plaintiffs' complaint supplies conclusions and not facts, it fails to state a claim upon which relief can be granted and should be dismissed.

The federal defendants argue that even if the court found plaintiffs' complaint to meet the general pleading standard above, suits against federal officials require a heightened degree of specificity and particularity for factual allegations. Under this standard, complaints containing only conclusory, vague, or general allegations cannot survive a motion to dismiss. Branch v. Tunnell, 14 F.3d 449 (9th Cir. 1994). The federal defendants argue that plaintiffs have not plead specific facts with sufficient particularity to meet all the elements necessary to lay a foundation for recovery against each particular defendant named in the suit. Based on a review of plaintiffs' complaint, the court finds that plaintiffs' allegations are all conclusory and are not supported by facts and therefore, dismissal is appropriate.

The federal defendants also seek dismissal of all the claims brought under the Federal Tort Claims Act (FTCA). The defendants base this motion on the grounds that the court lacks subject matter jurisdiction because the administrative exhaustion requirement under FTCA has not been met. 28 USC 2675(a) requires a claim be presented to the appropriate federal agency before a suit is brought under the FTCA. Parker v. United States, 935 F.2d 176 (9th Cir. 1991). 28 USC Sec 2675(a) provides in part:

> An action shall not be instituted under a claim against the United States . . . unless the claimant shall have first presented the claim to the appropriate federal agency and his claim shall have been finally denied by the agency . . . . The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant, any time thereafter, be deemed a final denial.

Plaintiffs filed an administrative tort claim with the United States Postal Service on February 24, 1995 and filed the current

complaint with this court on May 15, 1995. The federal defendants reason that because no final denial of plaintiffs' administrative claim was made by the USPS when plaintiffs filed their complaint with this court, nor had six months passed from the filing of the administrative tort claim, the plaintiffs' FTCA claims must be dismissed since it was filed prematurely, and therefore the court would not acquire subject matter jurisdiction.

Although plaintiffs' agree that the administrative exhaustion requirement under 28 USC 2675(a) has not been met, plaintiffs' assert that they did not attempt to plead a federal tort claim cause of action. Plaintiffs' Opposition to Federal Defendant's Motion to Dismiss at page 3.

BIVENS REMEDY

The federal defendants argue that there is no Bivens remedy on the facts of this case. In Bivens, the Supreme Court recognized the possibility of money damages when federal employees had violated a plaintiff's constitutional rights and where no other "make whole" remedy is available. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971). The federal defendants argue, and the court finds, that plaintiffs' fourth and fifth amendment claims must fail because Congress has created an exclusive remedy for damages arising out of the collection of taxes. See 26 USC Sec. 7433.

CONCLUSIONS

For the foregoing reasons, and based on the cited authorities, federal defendant's motion to dismiss (doc. #40) is granted in its entirety. Federal defendant's motion to dismiss (doc. #51) and federal defendant's alternative motion for summary judgment are both granted in their entirety. It is further ordered that defendant Moore's motion for summary judgment (doc. #45) is also granted in its entirety. On the court's own motion, plaintiffs' request for a grand jury investigation is denied and plaintiffs' purported claims against John Doe defendants 1 through 15 and/or Jane Doe defendants 1 through 12 are dismissed. Such claims are not recognized in the District of Oregon.

IT IS SO ORDERED.

DATED this 26th day of September, 1996.

ANCER L. HAGGERTY
U. S. DISTRICT COURT JUDGE

FILED
MAR - 4, 1999
CATHY A. CATTERSON,
CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILLIAM C. VOSBURGH;
MARGARET VOSBURGH;
SANDRA VOSBURGH,

Plaintiffs-Appellants,

v.

TIMOTHY M. WELCH; THOMAS J. MOORE; IVETTE S. MCCOY; NATALIE J. BACHELDER; CHARLES W. STUCKEY; KENT S. ROBINSON; LESLIE J. WESTPHAL,

Defendants-Appellees.

No. 97-35071

DC #
CV-95-00454-ALH

ORDER

Before: THOMPSON and TROTT, Circuit Judges, and
RHOADES, District Judge.[1]

The panel, as constituted above, has unanimously voted to deny the petition for rehearing. Judges Thompson and Trott voted to deny the petition for rehearing en banc, and Judge Rhoades recommended denial.

The petition for en banc rehearing has been circulated to the full court, and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing, and the petition for rehearing en banc, are

DENIED.

[1] The Honorable John S. Rhoades, United States District Judge for the Southern District of California, sitting by designation.